STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 10, 2005
v	No. 252849 Wayne Circuit Court
ROBERT MICHAEL MCNALLY, Defendant-Appellant.	LC No. 03-009825-02

Before: Wilder, P.J., and Sawyer and White, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of breaking and entering a building with intent to commit a felony or larceny, MCL 750.110. He was sentenced to 23 to 120 months' imprisonment as a fourth habitual offender. MCL 769.12. He appeals as of right, and we affirm.

In the early morning hours of August 9, 2003, Janice Perry left the Dunn Inn Tavern in Detroit with her husband and defendant, who was a frequent patron of the tavern. As the last employee to leave, Perry locked the front door upon exiting. She and her husband then walked across the street to a restaurant while defendant rode away on his bicycle. Perry noted that defendant, who she had known for several years, was wearing a cream or light gray and black plaid flannel shirt, a red cap, and glasses.

Louis Schodowski, a homeless man who lived behind the tavern and was a regular customer there, saw defendant in the tavern several hours before it closed. Schodowski testified that defendant was wearing a light colored flannel shirt, a red baseball cap, and dark pants. Schodowski had known defendant for approximately 1-1/2 years. Schodowski left the tavern at 1:00 a.m. on August 9, 2003, and went to sleep in the back alley. He was awakened by a noise a couple of hours later after the tavern was closed. He saw defendant climbing onto the roof of the tavern. Defendant was still wearing the outfit he had on earlier. Schodowski did not see anyone else in the area and ran to call the police.

James Carter testified that, shortly after 4:00 a.m., he left the restaurant across the street from the tavern after buying coffee on his way to work. He heard the front window of the tavern break, and observed a person in a red baseball cap and gray flannel shirt come through the window. The person ran to the alley behind the tavern.

When the police arrived, they found damage to the air vent on the roof. The cover of the vent had been removed and was large enough to enable a person to gain entry to the tavern. The front window was broken outward, indicating that it was broken from the inside. The tavern was ransacked, and money and cigarettes were stolen. There was also property damage. Schodowski told a responding police officer that defendant was the person he saw breaking into the tavern.

As his defense, defendant's mother testified that defendant was in an accident while on his bicycle, had endured extensive surgery, and had trouble with mobility. Defendant was convicted as charged.

I

Defendant first argues that trial counsel was ineffective in failing to 1) make an opening statement, 2) move for a mistrial in response to the testimony of the prosecution's rebuttal witness, 3) advance a proper basis for objecting to testimony regarding defendant's nickname being "Rooftop," 4) argue defendant's disability as a defense, and 5) ensure fair conditions of trial. We disagree.

In order to prevail on an ineffective assistance claim, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

Waiver of an opening statement is a subjective judgment on the part of trial counsel, which can rarely, if ever, be the basis of a successful claim of ineffective assistance of counsel. *People v Pawelczak*, 125 Mich App 231, 242; 336 NW2d 453 (1983). Where defense counsel gives a complete closing argument and is given a full and fair opportunity to comment on the case and the evidence, prejudice cannot be shown by the lack of an opening statement. See, e.g., *People v Buck*, 197 Mich App 404, 413-414; 496 NW2d 321 (1992), rev'd in part on other grounds sub num *People v Holcomb*, 444 Mich 853 (1993). Opening statements are commonly waived in bench trials. In this one-day bench trial, an opening statement was unnecessary and neither party made one. The trial court heard the evidence and defense counsel's complete closing argument before deciding the case. We conclude that defendant has not demonstrated that counsel's failure to make an opening statement fell below an objective standard of reasonableness or affected the outcome of his trial. *Stanaway, supra.*

With regard to defendant's nickname, to the extent that defendant challenges the court's ruling that a statement made by defendant is not hearsay under MRE 801, because it was not an admission but merely a statement, defendant is incorrect. The rule makes no distinctions between admissions and statements. Regarding the rebuttal witness, the court intervened and cut off the questioning regarding the nickname. Finally, this was a bench trial, and the court is presumed to have made its decision based on the evidence concerning the alleged offense, rather than the defendant's nickname. In its findings of fact, the trial court did not afford any weight to the challenged testimony, and the other evidence was substantial and overwhelming evidence of defendant's guilt.

Nor do we find ineffective assistance in counsel's failure to argue in closing that defendant's physical condition made it unlikely that he was the perpetrator. Although defendant's mother had testified in this regard, the prosecutor presented rebuttal testimony that no disability was observed. Counsel's decision to focus on the problems with Schodowski's testimony can only be considered sound trial strategy. *In re Ayres*, 239 Mich App 8, 23; 608 NW2d 132 (1999). "This Court is reluctant to substitute its judgment for that of trial counsel in matters of trial strategy." *Id.* at 22. Defense counsel obviously determined that the disability defense was not worthy of presentation to the trial court in this bench trial.

II

Defendant next argues that the prosecutor engaged in misconduct by introducing the testimony that his nickname was "Rooftop." Because defendant did not preserve this issue with an objection at trial, our review is limited to plain error affecting defendant's substantial rights. *Carines, supra; People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). We are satisfied that references to defendant's nickname did not affect the outcome of the trial and therefore did not affect defendant's substantial rights.

III

Defendant additionally argues that the prosecutor committed misconduct when offering the rebuttal testimony of Officer William Galen, the officer in charge of the case. After defendant's mother testified about defendant's claimed disability, Galen testified that he had contact with defendant in relation to this case and also had previous contact with defendant in 2002 on another case. Over defendant's relevancy objection, Galen testified that defendant had nothing physically wrong with him in 2002 and appeared to have no physical disability when Galen contacted him in relation to this case. Defendant now argues that the admission of the rebuttal testimony was an attempt to introduce defendant's prior bad acts in violation of the rules of evidence.

"Rebuttal evidence is admissible to 'contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same.'" *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996). Galen's rebuttal testimony was proper in scope and purpose because it directly weakened and impeached the testimony of defendant's mother that defendant was physically disabled. Galen's prior contact with defendant, wherein he observed no disability, coupled with his observations of defendant in conjunction with this case were relevant and not unfairly prejudicial. Further, the challenged evidence was not inadmissible under MRE 404(b). Relevant, other-act evidence does not violate MRE 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity with that propensity at the time of the crime. *People v Katt*, 248 Mich App 282, 304; 639 NW2d 815 (2001); aff'd 468 Mich 272; 662 NW2d 12 (2003). The challenged evidence was not propensity evidence.

Defendant additionally argues that counsel was ineffective for failing to move for a mistrial after the prosecutor introduced Galen's testimony that defendant was contacted in relation to a previous case. Trial counsel is not required to make meritless motions. *People v Darden*, 230 Mich App 597, 604-605; 585 NW2d 27 (1998). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a

fair trial." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Because we have concluded that the rebuttal evidence was proper in scope and purpose, any motion for mistrial based on the evidence would have been without merit. Thus, defendant has failed to affirmatively demonstrate that counsel's performance fell below an objective standard of reasonableness. *Stanaway, supra.*

IV

Defendant also argues both prosecutorial misconduct and evidentiary error with respect to Perry's testimony about a statement made by defendant as they left the tavern together on the date of the crime. Defendant objected to the challenged testimony on hearsay grounds and thus, the evidentiary challenge to the trial court's subsequent ruling is preserved. We review the trial court's decision for an abuse of discretion. *People v Herndon*, 246 Mich App 371, 406; 633 NW2d 376 (2001).[1] Defendant's challenge to the evidence on the grounds that it was irrelevant and unfairly prejudicial is not preserved because those issues were not raised before, or decided by, the trial court.[2] Additionally, the claim of prosecutorial misconduct premised on the admission of the evidence is not preserved because there was no objection to the prosecutor's conduct. We review the unpreserved issues for plain error affecting defendant's substantial rights. *Carines, supra; Watson, supra.*

Perry testified that, when she was leaving the tavern, she was carrying several items. She asked defendant to hold a bowl while she locked the door. Over defendant's hearsay objection, Perry testified that, when she asked defendant to hold the bowl, he stated, "I guess you don't want me to hold your purse, do you, ha-ha." Defendant's statement was not hearsay. MRE 801(d)(2)(A) provides that a party's own statement, which is offered against him, is not hearsay. As previously discussed, a party's statement does not need to be against his interests to be admissible under that rule. *Herndon, supra* at 408. Because the challenged statement was not hearsay, MRE 801(d)(2)(A), the trial court did not abuse its discretion in overruling defendant's hearsay objection. While defendant declares that the evidence was "highly prejudicial and irrelevant," we are satisfied that the court did not base its decision on this testimony.

Affirmed.

/s/ Kurtis T. Wilder
/s/ David H. Sawyer
/s/ Helene N. White

[1] While defendant argues the evidentiary issue in terms of the constitutional right to due process, evidentiary issues fall into the category of nonconstitutional issues. *Herndon, supra* at 402 n 71.

[2] Generally, an objection based on one ground is insufficient to preserve an appellate attack based on another ground. *People v Maleski*, 220 Mich App 518, 523; 560 NW2d 71 (1996).